THE STATE OF NEW HAMPSHIRE

MERRIMACK, SS **SUPERIOR COURT**

217-2020-CV-00252

Louise Spencer
3 Kent Street
Concord, NH 03301

v.

Governor Christopher Sununu
(In his official capacity only)
New Hampshire State Capitol
107 North Main Street
Concord, NH 03301

PETITION FOR ACCESS TO PUBLIC RECORDS

NOW COMES the Petitioner, Louise Spencer and respectfully petitions this Honorable Court for declaratory and injunctive relief pursuant to Part I, Article 8 of the New Hampshire Constitution and New Hampshire Revised Statutes, Chapter 91-A, against Governor Christopher Sununu, saying as follows:

Preliminary Statement

1. The State of New Hampshire has deemed the public's right to know what their government is up to so vitally important that it has enshrined the right in the Constitution. More specific procedural and substantive rights are laid out in the state's Right-to-Know Law, RSA Chapter 91-A (2020), which the New Hampshire Supreme Court has confirmed furthers the goals of the Constitutional Provision.

2. Petitioner in this case has requested records from the Governor's Office pursuant to the Constitutional Provision and the Right-to-Know Law with the potential to shed light on the Governor's August 2019 veto of bipartisan legislation designed to create an independent

redistricting commission. As we enter a hotly contested presidential election cycle, it is difficult to imagine an official function in which the public has a stronger interest than elected officials' roles in bolstering or undermining the fairness of future elections.

3. And yet Petitioner has received no records responsive to her request. Instead, the Governor's Office has failed to meet its legal obligations of public disclosure in four ways. First, the Governor's Office argues that it is not subject to the Right-to-Know Law, calling into question the process it has followed in responding to the Petitioner's request (not to mention whether and how it will respond to future requests). Second, the Governor's Office has made a subjective determination that "arguably responsive" records it has identified are not actually "governmental records" subject to disclosure, despite strong inferences to the contrary based on available information. Third, the Governor's Office has implemented a policy and practice resulting in premature destruction of records contrary to the spirit of the Constitutional Provision and the Right-to-Know Law. And finally, the Governor's Office has declined to search locations where deleted materials may still exist in order to locate responsive records.

4. For all of these reasons, Petitioner has initiated this action to compel disclosure of records vitally important to informing the public of their government's activities related to redistricting reform in the lead-up to an election year. The available evidence strongly suggests that the records already identified and withheld by the Governor's Office are in fact governmental records subject to disclosure. Moreover, the Office's attempt to evade its legal disclosure obligations by implementing a policy of regularly and quickly destroying records undermines the spirit animating both the Constitutional right of access as well as the Right-to-Know Law. Accordingly, the Governor's Office should be required to produce in full the records that have

been withheld and to conduct an additional search of any available backup systems to locate, restore, and produce additional responsive materials.

Parties

5. Petitioner Louise Spencer is a citizen of the State of New Hampshire with an address of 3 Kent Street, Concord, NH 03301. Ms. Spencer is co-founder of the Kent Street Coalition, an all-volunteer grassroots advocacy group dedicated to organizing and mobilizing around a variety of public policy issues, including, among other things, voting rights, campaign finance reform, redistricting, and electoral reform. Ms. Spencer and the Kent Street Coalition see public records requests as a vital component of grassroots advocacy and democratic citizen engagement.

6. Respondent Governor Christopher Sununu is the head of the Office of the Governor, a public agency of the state of New Hampshire with an address of 107 North Main Street, State Office Building, Concord, NH 03301.

Jurisdiction and Venue

7. This court has jurisdiction over this matter. *See* RSA § 91-A:7; *In re Union Leader Corp.*, 147 N.H. 603, 604 (2002).

8. Pursuant to RSA 91-A:7, proceedings under RSA 91-A shall have "high priority" on the Court's calendar.

9. Venue is proper in this Court pursuant to RSA 507:9, because both Petitioner and Respondent are located in Merrimack County.

Factual Background

10. On August 9, 2019, Governor Sununu vetoed H.B. 706 (N.H. 2019), bipartisan legislation that would have established an independent advisory commission to carry out the

State's decennial obligation to draw legislative, congressional, and Executive Council district maps following the 2020 elections.

11. The bill, which would have divided the redistricting process evenly among Democratic, Republican, and unaffiliated commission members, and also would have "create[d] a new citizens' advisory commission to bring independence, transparency, and public input to a redistricting process formerly kept under wraps," has been described as "a model for bipartisan redistricting reform."[1]

12. On information and belief, legislators on both sides of the aisle had anticipated that the Governor would sign the bill, which had drawn bipartisan support.

13. In fact, on information and belief, the Governor's Office had discussions about planning for a signing ceremony.

14. Nonetheless, without any prior indication of concerns about the bill, Governor Sununu suddenly pivoted and vetoed the bill.

15. On August 22, 2019, less than two weeks after the veto, Scott Walker, former governor of Wisconsin and a political activist currently serving as Finance Chair for the National Republican Redistricting Trust (the "NRRT"), authored an editorial arguing that Governor Sununu "was right to veto [the] redistricting bill."[2]

16. On January 6, 2020, Petitioner Louise Spencer delivered to the Governor's Office a request for records pursuant to Part 1, Article 8 of the New Hampshire Constitution and New

[1] *See Brennan Center Responds to New Hampshire Governor's Veto of Redistricting Reform Bill*, Brennan Center for Justice (Aug. 9, 2019), https://www.brennancenter.org/our-work/analysis-opinion/brennan-center-responds-new-hampshire-governors-veto-redistricting-reform.
[2] *Scott Walker: Sununu Was Right to Veto Redistricting Bill*, Concord Monitor (Aug. 22, 2019, 9:30 AM), https://www.concordmonitor.com/Sununu-right-to-veto-redistricting-bill-27852699.

Hampshire Revised Statute, Chapter 91-A (the "Right-to-Know Law" or "Chapter 91-A"). *See* Exhibit A, Jan. 6, 2020 Records Request.

17. Specifically, Ms. Spencer requested all communications between, on the one hand, Governor Sununu and specified individuals employed in the Office of the Governor and/or working on the Governor's behalf, and on the other hand, Scott Walker and other specified individuals, as well as individuals communicating on behalf of the NRRT and other specified organizations, from August 1, 2019, through August 30, 2019. *See* Ex. A.

18. On January 22, 2020, counsel employed in the Governor's Office ("Governor's Counsel") acknowledged Ms. Spencer's request and indicated that he anticipated providing a response 60 days from the date of the request.

19. On March 9, 2020, Governor's Counsel provided a formal response to the request. *See* Exhibit B, Mar. 9, 2020 Response Letter.

20. In the response, Governor's Counsel stated "that it is the long-standing position of the New Hampshire Department of Justice that RSA 91-A does not apply to the Governor's Office," and that the Office "responds to such requests as inquiries pursuant to Part I, Article 8 of the New Hampshire Constitution to the extent applicable and subject to all privileges and defenses under New Hampshire law." Ex. B.

21. Governor's Counsel went on to state that the Office "is not in possession of any governmental records that are responsive to your request." *Id.*

22. However, Governor's Counsel further stated that he had "withheld 11 emails (along with some associated attachments) which, while in possession of office employees and arguably responsive to your request, are not considered governmental records because they were not created, sent or received by the relevant employees in furtherance of their official functions." *Id.*

23. On March 11, 2020, Ms. Spencer, through her attorneys, requested a *Vaughn* Index[3] and certain additional information concerning the records withheld by the Governor's Office to better assess the claim that the withheld emails and attachments are not governmental records.

24. By email dated March 20, 2020, Governor's Counsel indicated that, because he had withheld the records based on a determination that they are not governmental records, and not under claim of privilege, the Office would not provide a *Vaughn* Index, but that he would be willing to provide more information concerning his determination by telephone.

25. On March 25, 2020, Governor's Counsel discussed the request and determination by telephone with Ms. Spencer and her counsel.

26. Governor's Counsel described his general process for responding to Right-to-Know requests and the specific results of his efforts to locate records responsive to Ms. Spencer's request. He explained that he had located no responsive records on official government email accounts. Instead, Governor's Office staff members identified eleven emails and associated attachments arguably responsive to the request in their personal email accounts (the "Withheld Records").

27. Governor's Counsel declined to identify the staff members whose emails were at issue, but he did explain that certain of them had personal relationships with an employee of the NRRT (who is also a former member of the Governor's staff), which accounted for several of the Withheld Records.

[3] Preparation of a so-called *Vaughn* Index is a procedure developed in federal Freedom of Information Act ("FOIA") jurisprudence and adopted by New Hampshire and other state courts in which the government agencies provides an index "includ[ing] a general description of each document withheld and a justification for its nondisclosure." *Union Leader Corp. v. N.H. Hous. Fin. Auth.*, 142 N.H. 540, 548 (1997); *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973).

28. Governor's Counsel subsequently agreed to share the dates and times the Withheld Records had been sent, but as of the date of this petition, that information has not been provided.

29. Governor's Counsel indicated that he understood Ms. Spencer's request to be related to redistricting legislation. He did not state that the Withheld Records were unrelated to that subject.

30. When asked about his determination that the Withheld Records were "not created, sent or received by the relevant employees in furtherance of their official functions," Governor's Counsel generally described his view as to the distinction between communications made in furtherance of official job duties within the Governor's Office and communications between friends of a similar political leaning to "hash out issues" on their personal time. He also referenced political activities in which the Governor is involved, noting his view that those political activities do not cross into the public function fulfilled by the Governor or his staff.

31. He acknowledged that making a determination based on this distinction "is an art, not a science," and that the determination as to the records implicated by Petitioner's request was made in his discretion.

32. He also noted that the fact that the Withheld Records originated in staff's personal email accounts was a factor that, while not dispositive, was given some weight in his determination. Specifically, he said he always "leans against" turning over personal emails.

33. During the March 25, 2020 phone call, Governor's Counsel also provided information concerning the Office's records retention policies and practices.

34. Specifically, he stated that Governor's Office email accounts are subject to a 30-day auto-deletion policy. On information and belief, this policy results in the automatic deletion

of any messages in a user's inbox that are not affirmatively saved into a separate folder or subfolder within 30 days.

35. In addition, the email accounts have limited storage capacity and staff are encouraged to regularly delete items they determine they do not need or will not want to reference in the future.

36. Governor's Counsel stated that there are no specific statutory retention requirements that apply to the Governor's Office.

37. Governor's Counsel further indicated that Governor's Office staff have discretion over which records they retain and which they delete.

38. Based on this policy, Governor's Counsel told Ms. Spencer that he was not surprised that he had not identified any responsive records in the Governor's or staff members' official email accounts, because the request had been submitted more than 30 days after the August 2019 timeframe referenced in the request.

39. Petitioner requested additional information concerning whether deleted files may still exist, including for example, in .pst files (i.e., back-up files created by Microsoft's Outlook email program) or on back-up storage tapes, and if so, whether the Governor's Office would be willing to search for responsive records in those locations. However, as of the date of this petition, that information has not been provided.

Argument

40. The Governor's Office is currently withholding documents it is likely obligated to disclose under the Right-to-Know Law as well as Part 1, Article 8 of the New Hampshire Constitution. While the Governor's Office purports to respond to public records requests solely pursuant to the Constitutional Provision, there is no principled reason that the Governor's Office

should not comply with the procedural and substantive requirements laid out in the statutory scheme to further safeguard the public's right of access.

41. With respect to the Withheld Records, the Governor's Office's argument that they are not in fact "governmental records" runs contrary to the available evidence and common sense. Respondent's bare assertions that they are not governmental records simply because they originated in personal email accounts—and notably, absent a claim that they do not relate to redistricting—is insufficient in determining whether they meet the statutory definition and must be disclosed pursuant to Chapter 91-A. Furthermore, Respondent's failure to provide a voluntary *Vaughn* index or provide additional context, such as the date, time, senders or recipients, to confirm the documents were properly excluded highlights the Governor's Office's reluctance to fully uphold New Hampshire's constitutional and statutory commitment to government transparency.

42. Moreover, Respondent's failure to produce the Withheld Records is rendered even more problematic by its implementation of a policy and practice resulting in the regular destruction of substantial numbers of governmental records not long after they are created. This policy underscores the Governor's Office's disinclination to follow either the letter or the spirit of the law and serves only to undermine public confidence in the accountability of their highest-ranking elected official.

43. The remedy to these concerns must be for the Court to clarify that the Governor's Office is in fact subject to the Right-to-Know Law, to order the disclosure of the Withheld Records, and to order the Governor's Office to search for deleted files responsive to Petitioner's request.

I. The Governor and Governor's Office Staff Are Subject to Chapter 91-A

44. As an initial matter, in light of the role of the Right-to-Know Law of furthering the public's constitutional right of access to governmental records, there is no principled reason to exclude the Governor or his Office from the statute's purview.

45. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to guarantee a public right of access to governmental records: "Government . . . should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* New Hampshire is one of the few states that explicitly enshrines the right of public access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). The Constitutional Provision does not limit the government officials or offices to whose records the public is entitled reasonable access. Article 8's language was included "upon the recommendation of the bill of rights committee to the 1974 constitutional convention and adopted in 1976." Lawrence Friedman, *The New Hampshire State Constitution* 53 (2d. Ed. 2015). While New Hampshire already had Chapter 91-A to address the public and the press's right to access information, the committee argued that the right was "'extremely important and ought to be guaranteed by a constitutional provision.'" *Id.*

46. The New Hampshire Supreme Court has since interpreted the Right-to-Know Law under Chapter 91-A as "help[ing to] further our State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002). The face of the law demonstrates that it is designed to create transparency with respect to how the government interacts with its citizens. *See* RSA 91-A:1 (Preamble: "Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible

public access to the actions, discussions and records of all public bodies, and their accountability to the people."). There is no reason to exclude the Governor from such public access—arguably, public access is all the more essential with respect to the actions of the highest-ranking public servant in the executive branch.

47. And indeed, the plain language of the statute indicates that the Governor and his office are subject to Chapter 91-A. Statutory construction begins with the plain language of the statute. *ATV Watch v. N.H. Dep't of Transp.*, 161 N.H. 746, 752 (2011) ("When interpreting a statute, we first look to the plain meaning of the words used . . . .") (quoting *Prof'l Firefighters of N.H. v. Local Gov't Ctr.*, 159 N.H. 699, 703 (2010). The Right-to-Know Law provides that "[e]ach public body or agency shall, upon request for any governmental record reasonably described, make available for inspection and copying any such governmental record within its files," or if they are not immediately available, shall provide within five business days either the records, a denial of the request, or a "a written statement of the time reasonably necessary to determine whether the request shall be granted or denied and the reason for the delay." RSA 91-A:4(IV)(a)-(b). "Governmental records" include "any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function." RSA 91-A:1-a(III).

48. "Public agency" is defined as "any agency, authority, department, *or office of the state* or of any county, town, municipal corporation, school district, school administrative unit, chartered public school, or other political subdivision." RSA 91-A:1-a(V) (emphasis added). Though the statutory definition of "public *body*" may exclude the Governor, there is nothing in the statute to suggest that the Governor or his office are excluded from the law's requirement that public *agencies* make governmental records available to members of the public. *See* RSA 91-A:1-

a(VI)(b) (defining "public body" to include, in relevant part, "[t]he executive council and the governor with the executive council," excluding the governor from the definition in the absence of the executive council).

49. The fact that the law specifically excludes the Governor from the definition of "public body" highlights the absence of any analogous exclusion from the definition of "public agency," indicating that the legislature intentionally created different definitions for these two terms. *See City of Manchester v. Secretary of State*, 161 N.H. 127, 133 (2010), *superseded on other grounds* ("The force of the maxim [*expressio unius est exclusion alterius*] is strengthened where a thing is provided in one part of the statute and omitted in another.") (quoting N. Singer, *Statutes and Statutory Construction* 417 (7th ed. 2007)). Because the Right-to-Know Law's provisions applicable to "public bodies" apply primarily in the context of public meetings and associated records, such as minutes, it makes sense that the "public body" definition would apply to the Governor only when he was joined by others in an official, formal meeting context. *See, e.g.*, RSA 91-A:2(I) ("For the purpose of this chapter, a 'meeting' means the convening of a quorum of the membership of a public body[.]"); RSA 91-A:2-a(I) (". . . public bodies shall deliberate on matters over which they have supervision, control, jurisdiction, or advisory power only in meetings held pursuant to and in compliance with the provisions of RSA 91-A:2, II or III"); RSA 91-A:3(I)(a) ("Public bodies shall not meet in nonpublic session, except for one of the purposes set out in paragraph II."); RSA 91-A:4(I) ("Every citizen during the regular or business hours of all public bodies or agencies . . . has the right to inspect all governmental records in the possession, custody, or control of such public bodies or agencies, including minutes of meetings of the public bodies . . .").

50. In contrast, public agencies must make available not just records associated with meetings, but rather any records generated in the furtherance of public servants' day-to-day official functions. *See* RSA 91-A:1-a(III); RSA 91-A:4(IV)(a)-(b).

51. Furthermore, nothing in cases related to public records requests to the Governor's office contradicts this conclusion. In *N.H. Republican State Committee v. Hassan*, for example, the plaintiff filed a petition pursuant to the Right-to-Know Law seeking judicial intervention regarding public records requests it had submitted to the Governor and other public agencies. No. 2016-cv-612, 2017 N.H. Super. Lexis 3, at *1 (N.H. Super. Jan. 17, 2017). The court analyzed the arguments pursuant to the statute and the opinion does not indicate that the Governor's office disputed the law's applicability. *See generally id.* The court made no suggestion the Governor's office is exempt from the statute but rather, in relevant part, simply analyzed and clarified "the standard to be applied in considering whether or not executive privilege exists." *Id.* at *12-13.

52. The sole case of which Petitioner is aware arguably confirming the notion that the Governor's Office is not subject to the Right-to-Know Law does not ultimately support that conclusion, particularly under the current state of the law. *See N.H. Democratic Party v. Benson*, Order, No. 04-E-092 (N.H. Super. June 2, 2004) (attached hereto as Exhibit C). The court in *Benson* accepted without meaningful analysis the defendant Governor's argument that the law does not apply to the Governor's office. *Id.* at 4. The court merely acknowledged a statutory interpretation argument advanced by the Governor based on the version of the law in effect at the time, which notably, has since been amended in relevant part. Specifically, the Governor "note[d] that the Right to Know Law omits the Governor and the Governor's office when defining 'public proceedings' as transactions by, 'the governor's council and the governor with the governor's council . . . .'" *Benson*, Order at 4 (citing RSA 91-A:1-a(I)(b)). In 2008, the

"public proceedings" definition was revised to "governmental proceedings," which is now defined with reference to the definition of "public body," which, as noted above, *supra* ¶ [49], arguably excludes the Governor. *See* RSA 91-A:1-a(II), (VI)(b). Moreover, the 2008 amendment added the "public agency" definition, which did not appear in the version of the statute at issue when *Benson* was decided. *See* RSA 91-A:1-a(V); *see also supra* ¶ [49].

53. The court in *Benson* also cited (again, without meaningful analysis) the Governor's reference to dicta from a case about public access to court records that similarly offered no analysis of the applicability of the statute to the Governor's office. *Benson*, Order at 4. (citing *In re Union Leader Corp.*, 147 N.H. 603 (2002)). In *In re Union Leader*, the court denied a request pursuant to Part I, Article 8 of the Constitution for copies of agendas and minutes for meetings of superior court judges, finding petitioner's definition of "court records" to be overly broad. 147 N.H. at 605. In reaching this conclusion, the court analogized to other types of governmental records, including the opinion's sole, brief reference to Governor's Office records:

> By analogy, adopting the petitioner's broad definition of "court records" would also affect other branches of government. For example, any records relating to meetings between the Attorney General and staff to discuss the day-to-day administrative operation of the Attorney General's office may be open to public inspection under Part I, Article 8. *Likewise, the public could demand access, based upon Part I, Article 8, to any record regarding meetings between the Governor and staff or between the Governor and a member of the executive council* or, in fact, a meeting between the Speaker of the House and senior staff. If the suggested access were permitted, government might become unduly cumbersome and candor among government officials stifled.

Id. (emphasis added).

54. But the court in *In re Union Leader*, 147 N.H. 603, did not hold that all records in the possession of the Governor's Office are categorically exempt from the Right-to-Know Law. *See id.* Nor did the Court provide any further analysis into why the vague, potential harms of

disclosure it foresaw could not be addressed through application of the definitions and exemptions set forth in the statutory scheme—for instance, by redacting exempt or privileged material. *See, e.g.*, *Hassan*, 2017 N.H. Super. Lexis 3, at *12–14 (setting forth standard for assessing claims of executive privilege).[4]

55. In short, *Benson*'s conclusion, accepting without analysis the Governor's reference to a now-outdated version of the statute and dicta in an inapposite case, should not be controlling here.

56. The Governor's Office has, on information and belief, an informal policy of responding to Right-to-Know requests notwithstanding its position that it is not statutorily obligated to do so. However, this policy could change at any time and leaves Petitioner and others uncertain as to their rights to public access that the law is intended to guarantee. Moreover, though the constitutional access provision applies even absent the statutory mandate, the Governor's Office has unilaterally excepted itself from the more specific substantive and procedural requirements of the law, meaning that broader privileges could be claimed and procedural safeguards (including but not limited to the time required for the government to respond to requests) could be ignored. Increased clarification of the legal obligations of the Governor's Office to provide governmental records to the public pursuant to both the

[4] And indeed, the Governor's Office referenced the statutory definition of "governmental records" in response to the request at issue here, suggesting that the Office already defers to the statutory scheme to make determinations in response to public records requests. *Compare* Ex. B (determining that the Withheld Records "are not considered *governmental records* because they were not created, sent or received by the relevant employees *in furtherance of their official functions*") (emphases added) *with* RSA 91-A:1-a(III) (defining governmental records as "any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency *in furtherance of its official function*") (emphasis added).

Constitution and the Right-to-Know Law will thus ensure Petitioner's and others' constitutional rights to an open, accessible, accountable, and responsive government.

II. The New Hampshire Constitution and Chapter 91-A Require that the Governor's Office Disclose Governmental Records, Including the Withheld Emails

57. As discussed above, public agencies must provide governmental records to requesters pursuant to the Right-to-Know Law, and in furtherance of the "State Constitutional requirement that the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Goode*, 148 N.H. at 553; 91-A:4(IV)(a)-(b); *see also* N.H. Const. pt. I, art. 8 ("Government . . . should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted.").

58. The public interest in disclosure of records is particularly great when it may potentially expose government misconduct or negligence. *See, e.g., Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673, 684 (2011) (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism.").

59. Consistent with these underlying principles of openness, accessibility, and accountability, courts resolve questions under Chapter 91-A "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.*, 142 N.H. 540, 546 (1997) (citation omitted).

60. Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode*, 148 N.H. at 554 (citation omitted). Courts "also look to the

decisions of other jurisdictions interpreting similar acts for guidance, including federal interpretations of the federal Freedom of Information Act (FOIA)." *Clay v. City of Dover*, 169 N.H. 681, 685–86 (2017). The burden of proof in the inquiry as to whether records must be released "rests with the party seeking nondisclosure." *Union Leader Corp.*, 142 N.H. at 549.

61. Governmental records subject to Chapter 91-A disclosure are defined as "any information created, accepted, or obtained by, or on behalf of, any public body, or a quorum or majority thereof, or any public agency in furtherance of its official function." RSA 91-A:1-a(III). "Information" is defined to include any "knowledge, opinions, facts, or data of any kind," without limitation as to its physical form, "including, but not limited to, written, aural, visual, electronic, or other physical form." RSA91-A:1-a(IV). Thus, whether information exists in a public servant's official government email account or his personal email account, it meets the definition of a "governmental record" so long as it was created or obtained in furtherance of his official function. *Cf. Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 150 (D.C. Cir. 2016) ("If a department head can deprive the citizens of their right to know what his department is up to by the simple expedient of maintaining his departmental emails on an account in another domain, [FOIA's purpose in ensuring informed citizenry] is hardly served.").

62. In determining whether the Withheld Records were created or obtained in furtherance of an official function performed by the Governor or his staff, the agency's subjective view as to whether these documents were created in the individuals' personal capacities is irrelevant. Rather, what matters is context based on objective considerations.

63. In the federal FOIA context, courts consider factors including, among others, the purpose for which the document was created and the extent to which the record's author or other employees used the record to conduct agency business. *See Consumer Fed'n of Am. v. USDA*, 455

F.3d 283, 287–93 (D.C. Cir. 2006). "[A]n agency's actual use of a document is often more probative than the agency's subjective intent." *Citizens for Responsibility & Ethics in Wash. v. U.S. Dep't of Homeland Sec*., 527 F. Supp. 2d 76, 97 (D.D.C. 2007).

64. The Attorney General's Office has acknowledged the importance of context in determining whether a document is created or obtained "in furtherance of [an] official function" under RSA 91-A:1-a. In a 2011 legal opinion from the Attorney General's Office, former Attorney General Michael Delany explained that some factors in determining whether, for example, an email was for official purposes consist of "the identity of the sender and recipient, the identity of persons copied on the email, the intended purpose of or motivation for the email, and the timing and context of the email." Attorney General Michael A. Delaney, *Request for Opinion Regarding Legislative E-Mail*, at 4 n.4 (June 29, 2011), https://www.doj.nh.gov/public-documents/documents/opinion-20110629-legislative-email.pdf.

65. The Governor's Office has thus far not provided the information that would provide this context, such as the sender and recipients, the purpose or subject matter, or the specific timing of the emails.

66. However, based on available information and context, the Withheld Records are public records in furtherance of an official function under RSA 91-A:1-a(III). The emails in question were sent between members of the Governor's staff and personnel of organizations—including the NRRT—with an interest in redistricting during August 2019, the month that the Governor vetoed a redistricting bill. Subsequently, but still during August 2019, a senior employee of the NRRT authored an editorial praising the Governor's veto.[5]

[5] Walker, *supra* note 2.

67. Tellingly, Governor's Counsel did not deny that the withheld records related to redistricting. It is difficult to understand how communications related to the subject of a bill the Governor was considering, at the time he was considering it, are unrelated to the official functions of the Governor and his staff. Even if any of the withheld records do not relate directly to redistricting, it stands to reason that organizations and individuals with a vested interest in the subject matter the Governor was actively working on at the time who sought to communicate with the Governor or his staff were doing so out of an interest in their "official functions." And records reflecting the organizations and individuals with access to the Governor's ear are exactly the sort of records in which the public has an acute interest. *See Prof'l Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and *favoritism*.") (emphasis added); *see also* N.H. Const. pt. I, art. 8 ("Government . . . should be . . . accountable . . . .").

68. Governor's Counsel argued that some personnel in the Governor's office have a personal, friendship relationship with an employee at the NRRT, purportedly supporting his conclusion that the records were personal, not governmental records. However, that fact just as easily supports the inference that the NRRT sought to go through less formal channels at its disposal to influence the Governor's official actions related to the redistricting bill.[6] And it is the public agency seeking nondisclosure that bears the burden of proof in the inquiry as to whether records must be released. *Union Leader Corp.*, 142 N.H. at 549.

[6] Also notable and relevant here is the fact that at least some of the emails included attachments. In the experience of the undersigned, attachments are more commonly included on communications related to official business than those reflecting personal exchanges between friends.

69. Accordingly, at a minimum, the Court should conduct *in camera* review of this small set of Withheld Records to make a *de novo* determination as to whether the records in question are governmental records subject to disclosure under Part 1, Article 8 of the New Hampshire Constitution and/or the Right-to-Know Law. *Prof'l Firefighters of N.H. v. HealthTrust Inc.*, 151 N.H. 501, 506 (2004) ("[W]hen there is a question whether materials are exempt from public access, the trial judge should conduct *in camera* review to determine whether portions of the materials meet any of the other statutory exemptions."). A *Vaughn* index may also be appropriate as "the overriding aim of the *Vaughn* index is to maximize disclosure of public documents—a purpose consistent with the aims of the Right-to-Know Law." *Union Leader v. N.H. Hous. Fin. Auth.*, 142 N.H. at 548.

III. The Governor's Office Must Search File Systems that Contain Deleted Materials

70. Part I, Article 8 of the New Hampshire Constitution and RSA Chapter 91-A—guaranteeing access to governmental records reflecting the activities of officials elected and appointed to serve the public—rest on the principle that government accountability and transparency are paramount. *See, e.g.*, *Goode*, 148 N.H. at 553.

71. A public agency's policy and practice of regularly destroying records shortly after they are created runs diametrically counter to that principle.

72. Here, the Governor's Office has a policy of automatically deleting any records not affirmatively saved within 30 days. It has also imposed a limit on the storage capacity on individuals' email accounts and encourages personnel to regularly clean out their inboxes.

73. This policy is particularly troubling where the Governor's Office has taken the position that it is not subject to the Right-to-Know Law, including "the 5-day timeline provided for in RSA 91-A." *See* Ex. B.

74. But even if the Governor's Office agreed with Petitioner's position that it is subject to the statute and bound by its 5-day timeline, the Office's 30-day auto-deletion policy is still troubling. Records do not lose their ability to inform the public after 5 days or after 30 days. Here, for example, records related to redistricting legislation—particularly records reflecting whether and to what extent external parties exerted influence over the Governor's decision to veto the bill—remain highly relevant as the nation barrels toward the 2020 election.

75. The fact that records responsive to Petitioner's request on this subject may have been deleted because she did not ask for them within 30 days of their creation (or sooner, as the relevant staff had the discretion to delete them at any time), even though they would still have been relevant now, eight months later (not to mention over a year later, when the election takes place) undermines the very purpose of Part I, Article 8 of the New Hampshire Constitution and the Right-to-Know Law.

76. However, it is possible that records responsive to Petitioner's request have not been irretrievably lost. When emails are deleted from an individual's account, they typically do not disappear completely. They may still exist in .pst files (i.e., back-up files created by Microsoft's Outlook email program) stored on individuals' hard drives or in emergency backup tapes, among other locations.[7]

[7] Petitioner recognizes that this Court has previously held under the facts presented in another case that "the back-up tapes themselves cannot be considered governmental records within the meaning of RSA 91-A:1-a." *See Twomey v. N.H. Dep't of Justice*, No. 217-2010-CV-503 at 5 (N.H. Super. Nov. 24, 2010). Petitioner disagrees with the conclusion in that case, which is not binding here. Furthermore, this case presents a different factual scenario than that in *Twomey*, wherein Petitioner sought records from a seven-year period, which had been deleted in accordance with relevant records retention policies. *Id.* at 2. Here, in contrast, Petitioner requested records from a one-month period less than one year after they were created, and which have apparently been deleted pursuant to an aggressive, informal policy of deleting records.

77. The Court should accordingly order the Governor's Office to search locations where deleted files may still exist for records responsive to Petitioner's request.

Conclusion

WHEREFORE, Petitioner Louise Spencer respectfully requests this Honorable Court:

A. Declare that the Governor and his Office are subject to Chapter 91-A;

B. Order the Governor's Office to release to Petitioner the withheld eleven emails and associated attachments or, in the alternative, submit those records for an *in camera* review;

C. Order the Governor's Office to search any and all locations where deleted files may exist for governmental records responsive to Petitioner's public records request;

D. Order the Governor's Office to release all governmental records responsive to Petitioner's public records request;

E. Award Petitioner her reasonable attorney's fees and costs, pursuant to RSA 91-A:8, I; and

F. Grant such other and further relief as may be deemed just and equitable.

Respectfully submitted,

May 11, 2020

/s/ Paul Twomey____

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